

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLEOTHA MONTGOMERY,

Defendant-Appellant.

UNPUBLISHED

June 13, 2013

No. 309993

Wayne Circuit Court

LC No. 11-008558-FC

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant Cleotha Montgomery appeals by right his jury convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced Montgomery as a fourth habitual offender, MCL 769.12, to serve concurrent prison terms of 7 to 15 years for the assault conviction and 3 to 15 years for the felon-in-possession conviction, which are to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Because we conclude that there were no errors warranting relief, we affirm.

Montgomery's convictions stem from an incident where he shot his adult nephew, Jeffery. After spending some time drinking with his nephew, Montgomery drove home with Jeffrey. Montgomery went into his home and Jeffrey remained in the car. Jeffery testified that he suddenly felt a pain in his stomach, and looked up to see his uncle standing on the porch steps yelling and pointing a rifle at him. Montgomery, who was threatening to kill Jeffery, then fired a second shot.

Montgomery claimed that he shot Jeffery in self-defense. He testified that after they arrived at the house, Jeffery left the car and walked off somewhere while he remained in the car. According to Montgomery, Jeffery suddenly flung open the car door, pulled him out, and started "beating and choking" him. Jeffery eventually stopped and got back into the car. Montgomery said he went into the house, got a rifle, and returned to his front porch. He then ordered Jeffery to get out of the car. Montgomery testified that Jeffery made a grabbing motion, so he fired at the car because he wanted to scare Jeffery, but did not actually intend to shoot him. He said he again told Jeffery to get out of the car, but Jeffery again made a grabbing motion; so he fired once more, this time intending to shoot him.

On appeal, Montgomery argues that the trial court erred when it refused to instruct the jury that it could consider specific acts of violence by the victim. See CJI2d 7.23(1). This Court reviews de novo preserved claims of instructional error. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011).

A criminal defendant is entitled to have a properly instructed jury. *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010). The trial court must “instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner.” *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them. Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

In general, self-defense excuses the use of force against another when force is necessary to defend against an attack. *Dupree*, 486 Mich at 707. A defendant is entitled to use deadly force in self-defense if he honestly and reasonably believes that his life is in danger or that there is a threat of serious bodily harm. *People v Heflin*, 434 Mich 482, 508-509; 456 NW2d 10 (1990); MCL 780.972. Specific instances of violence or aggression on the part of the victim, if known to the defendant, are admissible to prove that the defendant had a reasonable apprehension of harm. *People v Harris*, 458 Mich 310, 316-317, 319; 583 NW2d 680 (1998).

Consistent with these principles, the trial court may give CJI2d 7.15(4), which instructs the jury that, in deciding whether the defendant feared serious physical injury or death, the jury may consider “all the circumstances,” including “whether the defendant knew about any previous violent acts or threats made by the other person.” Similarly, CJI2d 7.23 provides: “There has been evidence that the **[complainant/decedent]** may have committed violent acts in the past and that the defendant knew about these acts. You may consider this evidence when you decide whether the defendant honestly and reasonably feared for **[his/her]** safety.” The trial court denied Montgomery’s request to have the jury instructed consistent with CJI2d 7.23 and also omitted the “violent acts or threats” option from CJI2d 7.15(4).

At trial, Montgomery testified about past acts of violence that Jeffrey purportedly committed. He testified that Jeffery had used a gun to commit robberies and that he been “shooting” and “beefing” with a female acquaintance’s sons. To the extent that the trial court determined that Montgomery was entitled to a self-defense instruction and there was evidence that Montgomery was aware of “previous violent acts or threats made by” Jeffery, the trial court erred by omitting these instructions. However, we conclude that any error in this regard was harmless.

Here, the evidence did not support Montgomery’s self-defense instruction. According to Montgomery’s own testimony, Jeffery attacked him with his hands and fists and then abandoned the attack. Indeed, he stated that Jeffery remained in the car after he went into his home. Instead of staying inside, Montgomery armed himself and then escalated the situation by going out onto the porch and threatening Jeffery. Because Jeffery had abandoned the initial fight and both parties had retreated to positions of safety, Montgomery became the initial aggressor when he chose to return and confront Jeffery with a gun. “[A]n act committed in self-defense but with

excessive force or in which defendant was the initial aggressor does not meet the elements of lawful self-defense.” *Heflin*, 434 Mich at 509.

Moreover, although the trial court did not specifically instruct the jury to consider the fact that Montgomery knew about Jeffrey’s past violent acts in deciding whether he honestly and reasonably feared that he was in danger of imminent serious injury or death, it did instruct the jury to “consider all the circumstances” of the incident, including how they appeared to Montgomery and the nature of Jeffrey’s threat. Because the trial court’s error in instructing on self-defense benefited Montgomery and the instructions otherwise adequately protected his rights, we cannot conclude that any error warranted relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra